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No. 02-42

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT GILBERT P. HYATT

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CONSTITUTIONAL PROVISION

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BRIEF IN OPPOSITION FOR RESPONDENT GILBERT P. HYATT

STATEMENT

This case arises out of a tort suit brought by respondent Hyatt, a Nevada citizen, in Nevada state court against petitioner Franchise Tax Board of the State of California (the "Board"). Among various defenses, the Board asserted that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, compelled the Nevada courts to apply California law to the claims, in particular California law that purportedly shields the Board from liability for both negligent and intentional torts. The state district court elected to apply Nevada law. On appeal, the Nevada Supreme Court decided, on grounds of comity, to apply California law to the negligence claim, Pet. App. 11-12, but declined to apply California law to the intentional tort claims. Pet. App. 12-13. Noting that Nevada law does not shield Nevada officials from liability for intentional torts, the court

concluded that application of California law to deny redress to injured Nevada plaintiffs would "contravene Nevada's policies and interests in this case." Pet. App. 12.

The evidence introduced at the summary judgment stage showed that Board officials went well beyond typical investigative measures in an effort to extract additional tax revenues from respondent. The underlying tax dispute—which is still proceeding in California (Pet. 3)—turns on the date that respondent, a former California resident, became a permanent resident of Nevada. Seeking to establish a later date than respondent had submitted (and thus to extend the period during which respondent would have been a California citizen subject to California tax liability),[1] Board officials engaged in numerous tortious acts, including disclosures of private information about respondent to third parties, despite prior written and oral assurances that they would not do so. *See, e.g.*, Cowan Affidavit at 3-11 (Hyatt Appendix, Vol. VIII, Exh. 15); Depo. Exh. 101 (Franchise Tax Board audit file) at H01473, H01505, H01637 (Supp. Hyatt Appendix, Vol. X, Exh. 28). Furthermore, they carried out direct invasions of respondent's personal privacy, including efforts to look through mail and trash at his Nevada home. *See* Deposition of Candace Les at 269, 405 (Hyatt Appendix, Vol. VII, Exh. 11) (Les Deposition).

The conduct of one Board auditor, in particular, was extraordinary. This auditor, referring to respondent, declared that she was going to "get that Jew bastard." Les deposition at 10 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). According to

[1] In its petition, the Board seeks to give the impression that the 1991 income in dispute amounts to "$40 million." Pet. 3. In fact, the figure is less than half that ($17,727,743). *See* Cowan Affidavit Exh. 16 (Hyatt Appendix, Vol. VIII, Exh. 15) (Notice of Proposed Assessment).

"Hyatt Appendix" refers to appendices submitted to the Nevada Supreme Court in connection with the first petition for a writ of mandamus. "Supp. Hyatt Appendix" refers to the additional appendices submitted in connection with the second petition.

evidence from a former Board employee, the auditor freely discussed information about respondent—much of it false—including, among other things, details about members of his family, his battle with colon cancer, his girlfriend, and the murder of his son. *See, e.g.*, Les Deposition at 176, 255, 389, 391 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). At one point, she took the employee to respondent's Nevada home and photographed her standing in front of it. *See* Les Deposition at 42, 264, 402-03 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). Her incessant discussion of the investigation eventually led the employee to conclude that she had "created a fiction" about respondent and was "obsessed" with the case. *See* Les Deposition at 59-60, 61-63, 167-68 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts. The Board then sought summary judgment, arguing, *inter alia*, that the Full Faith and Credit Clause required the Nevada courts to apply California law and that, as a result, the Board was immune from liability for all claims. The Nevada district court rejected this defense, as well as defenses of sovereign immunity and comity, without opinion.

The Nevada Supreme Court affirmed in part and reversed in part.[2] With respect to the one negligence claim, the court decided that "the district court should have refrained from exercising its jurisdiction . . . under the comity doctrine . . . ." Pet. App. 11. While the court said that "Nevada has not expressly granted its state agencies immunity for all negligent acts," Pet. App. 12, it noted that "Nevada provides its agencies

[2] The Nevada Supreme Court initially granted a writ of mandamus directing the district court to enter summary judgment in favor of the Board, Pet. App. 38-44, concluding that respondent had not presented sufficient evidence to support his claims. Upon rehearing, the court vacated that order, Pet. App. 7, and entered the judgment now being challenged by the Board in its petition.

with immunity for the performance of a discretionary function even if the discretion is abused." Pet. App. 12. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Pet. App. 12.

The Nevada Supreme Court declined, however, to apply California immunity law to the intentional tort claims. With respect to the Full Faith and Credit Clause argument, the court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Pet. App. 12. Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

ARGUMENT

There is no need for further review in this case. The Nevada Supreme Court, in rejecting the Full Faith and Credit Clause argument made by the Board, did nothing more than correctly apply a well-established constitutional standard to a particular set of facts. The petition should be denied.

A. The sole argument advanced by the Board is that the Full Faith and Credit Clause compels Nevada courts to apply California law—in particular, its law of sovereign immunity—to the intentional tort claims brought by respondent.[3] But this

[3] The Board has not made, and the Question Presented does not encompass, any sovereign immunity argument separate and apart from its argument that the Full Faith and Credit Clause required Nevada courts to apply California immunity law. In particular, the Board does not contend that it is shielded by inherent sovereign immunity, a defense that, in any event, this Court has declined to recognize as binding on the courts of a sister State. *See Nevada v. Hall*, 440 U.S. 410, 416 (1979); *see also Alden v. Maine*, 527 U.S. 706, 738-39 (1999).

Court has repeatedly made clear that a forum State, having sufficient contacts with the lawsuit, need not apply the law of another State when to do so would offend its own public policy. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Carroll v. Lanza*, 349 U.S. 408, 412 (1955); *Pacific Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501-05 (1939).[4] The general rule is straightforward: "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker by Thomas*, 522 U.S. at 232 (quoting *Pacific Employers*, 306 U.S. at 501). More particularly, "the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza*, 349 U.S. at 412. Although a stricter rule applies with respect to *judgments, see Baker by Thomas*, 522 U.S. at 232-34, the Court has stressed that the Full Faith and Credit Clause applies with significantly less force to state *laws, id.*, stating flatly that the Clause does not "enable one state to legislate for

[4] A State must demonstrate that its contacts with the litigation are sufficiently extensive that "'choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion)). Given that respondent is a Nevada resident, and that the acts at issue occurred in (or caused harm in) Nevada, that standard is easily satisfied here.

the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers*, 306 U.S. at 504-05.

The Court has applied this principle, without variation, even when the law at issue would provide sovereign immunity to a defendant State. *See Nevada v. Hall*, 440 U.S. at 421-24. Although acknowledging that "in certain limited situations, the courts of one State must apply the statutory law of another State," *id.* at 421, the Court in *Hall* went on to emphasize that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 422. In that case, the California courts had chosen to apply California law, providing full redress for injuries incurred within its borders, despite efforts by Nevada to invoke the defense of sovereign immunity under Nevada law. *See id.* at 421-24. This Court upheld that decision, noting that California had a "substantial" interest in granting relief to injured persons. *See id.* at 424 (quoting App. to Pet. for Cert. vii) ("California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'").

The Nevada Supreme Court simply applied these familiar principles to this case. It first recognized that, under the recognized standard, "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. Then, having invoked the doctrine of comity to order summary judgment for the Board on the negligence claim, Pet. App. 11-12, it declined to order summary judgment on the intentional tort claims, stating that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. More particularly, it concluded that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts

committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

There is no serious question that the Nevada policy—redressing injury from intentional torts—is both genuine and significant. *See Nevada v. Hall*, 440 U.S. at 424. Indeed, like California in *Hall* (*id.*), Nevada has even chosen to subject its own officials to suit for comparable malfeasance. *See* Pet. App. 12 ("Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment"). In short, therefore, Nevada has made a deliberate policy choice that it will open its courts to persons injured as a result of intentional torts, even when the injury results from the acts of state employees. Nothing in the Full Faith and Credit Clause requires the State to subordinate that policy to the contrary policy of another State.

B. The Board does not address—indeed, does not even mention—this body of established law under the Full Faith and Credit Clause. Instead, its entire argument is that a footnote in *Nevada v. Hall*, 440 U.S. at 424 n.24, calls for a different analysis and that state courts are thus in need of guidance about the proper standard. Neither part of this argument is correct.

To begin with, the Board is making too much of footnote 24. In that footnote the Court merely noted that the action of the forum State (California) in applying its own law "pose[d] no substantial threat to our constitutional federalism" and "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," *id.*, adding that it "ha[d] no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.* Although the Court did not elaborate, this language seems to do nothing more than leave open the future possibility of applying a balancing test, as the Court had done in a few prior Full Faith and Credit Clause

cases, pursuant to which the Court might weigh the respective State interests. *See Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 547 (1935) (conflict to be resolved "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight"); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 73 (1954). That *dictum*, however, is of little use to the Board at this point. It is clear by now, if it was not when *Nevada v. Hall* was decided, that the Court no longer employs a balancing test as part of its Full Faith and Credit Clause analysis. Five Justices of this Court expressly said so in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), decided just two years after *Nevada v. Hall*, with the plurality of four Justices observing: "Although at one time the Court required a more exacting standard under the Full Faith and Credit Clause than under the Due Process Clause for evaluating the constitutionality of choice-of-law decisions, . . . the Court has since abandoned the weighing-of-interests requirement." 449 U.S. at 308 n.10 (plurality opinion), citing *Carroll v. Lanza*, *supra*; *Nevada v. Hall*, *supra*; *see also id.* at 322 n.6 (Stevens, J., concurring in the judgment) ("as noted in the plurality opinion . . . the Court has since abandoned the full faith and credit standard represented by *Alaska Packers*"). And, in the years since, the Court has adhered to the standard applied in the text of *Nevada v. Hall*—*i.e.*, that a forum State need not apply foreign law in derogation of its own legitimate public policy—without requiring the State to demonstrate that its policy interest predominates over the conflicting policy of another State. *See, e.g., Sun Oil Co. v. Wortman, supra.*

The Board certainly offers no reason to resurrect the abandoned "balancing" approach. In the first place, any attempt to weigh State interests, by its very nature, puts state and federal courts in the uncomfortable position of having to assess and value different competing public policies whenever multiple States claim to have an interest in a particular lawsuit.

Moreover, as the final authority with respect to applications of the Full Faith and Credit Clause, it would ultimately fall to this Court to pick and choose among those various interests, without the benefit of any reliable means for determining which State interest is, in fact, more important. This case provides a ready example: one State (Nevada) has decided that recovery for injuries should prevail over defenses of sovereign immunity, while another State (California) has ostensibly made the opposite choice. On what ground can it be said that, in Nevada courts, California law must be paramount?

Although the Board plainly believes that the Court should modify its Full Faith and Credit Clause standard in order to protect state sovereignty, that argument ignores several important factors. Most obviously, it gives no regard to the fact that a more intrusive Full Faith and Credit Clause doctrine would diminish the sovereignty of the *forum State*, denying it the right to establish the governing law for "persons and events within it." *Carroll v. Lanza*, 349 U.S. at 412. Furthermore, it fails to recognize that forum States, applying the existing standard, are highly unlikely to allow prosecution of suits that would seriously impede necessary governmental activity. Even a State that allows some suits against its own officials will typically provide sovereign immunity for actions integral to proper government operations. *See* Pet. App. 11-12 (discussing immunity of Nevada officials for discretionary acts). Thus, as in the case of the negligence claim here, *id.*, it may be expected that courts of that State will seek to accommodate officials of a sister State claiming similar protection under their own state law.

It is also doubtful that liability for intentional torts, especially torts committed against the small minority of audited non-resident taxpayers, will impede any legitimate efforts to enforce state tax laws. To state the obvious, proper tax collection does not require the sort of conduct engaged in by the Board here. While the Board refers to the "core sovereign function of state

tax enforcement," Pet. 9, it does not explain why this "core sovereign function" calls for actions that (in the case of one official, at least) amounted to something akin to a personal vendetta.[5] And, to the extent that the Board is concerned about potential liability for mere mistakes or misjudgments, it has already been accorded protection for those actions under the doctrine of comity. *See* Pet. App. 12. The policy concerns expressed by the Board are thus considerably overblown.

Finally, the two state court cases cited by the Board fall far short of demonstrating confusion with regard to the governing standard under the Full Faith and Credit Clause. *See Guarini v. State*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987); *Xiomora Mejia-Cabral v. Eagleton School*, 1999 WL 791957 (Sept. 16, 1999) (Mass. Super). Although both courts read footnote 24 in *Nevada v. Hall* quite broadly, the fact is that neither case ultimately turned on that reading. In *Xiomora Mejia-Cabral*, the Massachusetts court recognized sovereign immunity for Connecticut as a matter of comity. *See* 1999 WL 791957 at *3-*4. Noting that Massachusetts had retained its own sovereign immunity against similar lawsuits, *id.* at *3, the court concluded that there was "no policy of this state that would be undermined by respecting the terms and conditions on which Connecticut has waived its sovereign immunity." *Id.* at *4. In *Guarini*, the New Jersey court dismissed various claims against New York on four separate grounds—exclusive jurisdiction, sovereign immunity, comity, and lack of standing—without even referring to the Full Faith and Credit Clause, much less indicating a need for further guidance about how to proceed under its provisions. *See* 521 A.2d at 1364-71. These cases thus demonstrate that forum

[5] The Board appears to acknowledge that, even under California law, state officials may be held responsible for some unlawful actions with respect to tax enforcement. *See* Pet. 7-8 and note 3.

States are fully able to identify cases in which recognition of sovereign immunity, or other like defenses, for a sister State is appropriate.

What the Board ultimately refuses to accept in this case is that Nevada, the forum State, is acting as a co-equal sovereign. As such, it has its own sovereign interests in assuring redress for persons within its jurisdiction. *See Nevada v. Hall*, 440 U.S. at 426. As a sovereign itself, of course, the State of California may seek to find common ground with the State of Nevada regarding issues of liability and reciprocity. *Id.* It may not, however, simply elevate its own law over the law of its sister State by means of a flawed interpretation of the Full Faith and Credit Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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